United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL
WITH PROOF
OF SERVICE

77-7121

United States Court of Appeals

FOR THE SECOND CIRCUIT

DORALEE ESTATES, INC.,
Plaintiff-Appellee,

—against—

CITIES SERVICE OIL COMPANY,
Defendant and Third Party Plaintiff-Appellant,

—against—

MGO CORP. and MONTICELLO GAS & OIL CO., INC.,
Third Party Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 77-7121

DORALEE ESTATES, INC.,

Plaintiff-Appellee,

v.

CITIES SERVICE OIL COMPANY,

Defendant and Third-Party Plaintiff-Appellant,

v.

MGO CORP. and MONTICELLO GAS & OIL CO., INC.,

Third-Party Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

Preliminary Statement

This is an appeal from the judgment of the United States District Court for the Southern District of New York (Owen, U.S.D.J.) filed on February 2, 1977, entered by the

clerk on February 3, 1977. The judgment appealed from was entered upon the verdict of a jury (A-1337-A-1338), an order dismisssing the third-party claim of Cities Service Oil Company (hereinafter "Cities Service") against MGO Corp. and Monticello Gas & Oil Co., Inc. (hereinafter collectively "MGO") (A-1362), and the order (A-1360) denying Cities Service's motion to reduce the amount of punitive damages included in the judgment.

Statement of Issues for Review

1. Was the verdict contrary to the evidence and the law and should the court have directed a verdict dismissing the claim of Doralee Estates, Inc. (hereinafter Doralee) against Cities Service, or granted the motions of Cities Service to set aside the verdict and for judgment of dismissal n.o.v and for a new trial.?

2. Did the trial court err in dismissing the third-party claim of Cities Service against MGO?

3. Did the plaintiff fail to establish damages?

4. Did the court err in submitting the question of punitive damages to the jury?

5. Did the trial court err in the empanelment of the jury?

6. Did the trial court make numerous erroneous rulings which substantially prejudiced Cities Service?

Statement of the Case

Doralee owns a bungalow colony in the vicinity of Monticello, New York, and is engaged in the business of renting its bungalows to summer vacation residents.

Doralee claims that oil seeped from the oil storage plant operated by MGO and eventually reached Doralee's premises. The oil storage plant was operated by MGO. Cities Service was merely the owner and lessor thereof. Plaintiff filed its suit against Cities Service, above, however, evidently for the purpose of achieving federal jurisdiction based upon diversity of citizenship. Doralee's complaint stated eight causes of action. The first three claims were for nuisance, trespass and negligence. Claims four through seven were dismissed by the court for insufficiency. The eighth cause of action was to set aside the settlement of a prior action brought by Doralee against both Cities Service and MGO.

Cities Service filed a third-party complaint against MGO on the basis of the contractual indemnification contained in the lease between the parties whereunder MGO agreed to defend, indemnify and hold harmless Cities Service against any and all claims arising from the use and operation of the premises. (E-105, ¶8). During the course of the trial, the court granted Cities Service's motion to amend the pleadings to conform with the proof by adding an additional cause of

action based upon common law indemnification of Cities Service by MGO. (A-1096/5-16).

Plaintiff's complaint originally demanded damages of $12,500 for the period 1965 to April 25, 1972, (which admittedly was previously paid) $100,000 of damages after April 25, 1972 for diminution of the value of its property (A-8; A-9). In addition, plaintiff claimed in its Fourth, Fifth and Sixth causes of action consequential damages of $12,500 since April 25, 1972, and also claimed punitive damages of $25,000. More than 2 1/2 years after filing the original complaint, plaintiff moved to increase its claim for punitive damages from $25,000 to $200,000 and its motion was granted.

At the close of the proof the court denied a request for the direction of a verdict of dismissal in favor of Cities Service. On motion of counsel for MGO the court granted its motion dismissing the third-party claim of Cities Service against it. The court subsequently denied the motion of Cities Service for judgment setting aside the verdict which granted plaintiff $60,000 compensatory damages and $200,000 punitive damages and for dismissal, n.o.v., of the complaint. After suggesting that Cities Service move to reduce the $200,000 award of punitive damages (A-324/18), the court denied the motion.

For a substantial period prior to trial, and during each day of the trial the jury, which was not sequestered, had

the opportunity to read in the daily press, and hear on the broadcast media, of instances of oil pollution by ocean tankers.

Statement of Facts

Doralee owns a bungalow colony in the vicinity of Monticello, New York and rents space therein to summer vacation residents.

In the vicinity of plaintiff's premises was a small oil storage plant which was operated by the third party defendants. The plant, which was originally owned by MGO (E-26, ¶1), was sold by MGO to Cities Service in 1957 and concurrently leased back by MGO from Cities Service. The lease required MGO to maintain the premises and make all repairs other than structural (E-105, ¶6; E-107) and required MGO to indemnify, defend and hold harmless Cities Service from all claims made in respect of the manner in which the premises were used and operated by MGO. (E-105, ¶8).

Doralee claims that oil seeped from the oil storage plant and, moving through ditches, water courses and a swamp adjacent to plaintiff's premises, reached a small pond on the Doralee premises. The complaint concedes that plaintiff was compensated in the amount of $12,500 for such damages from 1965 through April 25, 1972 (A-8) and seeks permanent damages of $100,000 for diminution of value of its property and, as amended, $200,000 of punitive damages.

The allegation of $12,500 of prior compensation relates to the fact that the plaintiff had previously sued Cities Service and MGO in the Supreme Court of the State of New York, Sullivan County, on the same claim and liability that is asserted in the instant action (A-175/22-25; A-176/2-4). In the state court action a settlement was made on April 25, 1972, whereunder the plaintiff was paid $12,500 and issued a general release to Cities Service and MGO covering all claims and liability through October 24, 1972. (E-85). The settlement further provided that an oil separator, after approval of plans by the court, would be installed or, as an alternative, the use of the oil storage plant would be discontinued. (E-83). Cities Service offered proof (E-143-E-147) that it made a timely submission of plans for an oil separator to the state court justice, and it was established that the alternative of discontinuance of the use of the oil plant was accomplished on February 10, 1973. (A-442/3-6). This was during the winter season when plaintiff's premises were not under rental, and about five months prior to the commencement, on July 4, 1973 (A-520/12-13), of the plaintiff's 1973 summer rental season.

The plaintiff's proof of liability consisted principally of testimony and documents relating to observations made by personnel of the New York State Environmental Conservation Department and the Department of Health following an alleged "fish kill" that occurred on plaintiff's premises in April

1972. One of plaintiff's witnesses was Theodore R. Hudson, whose employment with the Environmental Conservation Department commenced in January 1972 (A-225/33), only three months before his observations in April of 1972. (A-236/7-10). Mr. Hudson had only a half year of non-degree college work (A-247/13-19) and admitted that he was not an expert. (A-231/5). His lack of expertness is fully attested by his testimony that oil is heavier than water. (A 239/13). His lack of reliability is attested by his testimony, reflected in responses only a few questions apart from each other, that he saw dead fish, that he saw "very few" and that he saw none. (A-265/10-A-266/19).

Most important, the conditions testified to by Hudson and evidenced by the documents admitted into evidence over Cities Service's objection, were prior in time to April 25, 1972, the date on which plaintiff settled the state court action and delivered its written general release exonerating Cities Service from all liability through October 24, 1972.

Other testimony with respect to the alleged presence of oil was given by Robert Rosch, who testified that he observed the bottom of plaintiff's pond in September, 1972 when it was drained in connection with the work of constructing the Village sewer. (A-195/14-17; A-147/4-25). This date was prior to the October 24, 1972 date of exoneration expressed in the Doralee release to Cities Service. (E-85). Rosch testified on direct examination that he was an engineer

and had two years of college. (A-194/19-23). On cross-examination he admitted that he did not finish either of the two college years (A-206/1) and that he held no professional status as an engineer (A-208/8-10). Although Rosch testified that he observed deposits of oil on the ground which lay beneath the pond (A-200/21-24), he admitted that he made no chemical analysis to determine the presence of oil. (A-210/11-23). He conceded, moreover, that he was not an expert in determining the nature and properties of the material at the bottom of the lake. (A-214/9-12). Rosch admitted that oil floats on the surface of water (A-214/20) and does not drop to the bottom of a lake. (A-214/25-A-216/6). He admitted further that the pond bottom was covered with decayed vegetation. (A-215/7-12). Judicial notice can be taken that such material, a precursor of peat, and, ultimately, of coal, is black. Rosch testified that it would cost $21,000 to remove the so-called oil-soaked earth and cart it away; he admitted the work was not done. (A-218/23-A-219/6). Plaintiff offered no proof to show whether the figure of $21,000 was greater or less than any diminution in value of plaintiff's premises. Indeed, plaintiff offered no proof as to permanent diminution in value. Notwithstanding that this was originally pleaded as plaintiff's sole claim for compensatory damages (A-7-A-8), Doralee withdrew this claim entirely at the trial. (A-863/14-18). Rosch's testimony, like plaintiff's proof by the testimony of the state employees,

represented observations made prior to the effective date of the general release delivered by plaintiff pursuant to the settlement of the state court action.

Other testimony as to alleged oil spills was presented through a witness named Matthew Motl, who testified that he was in the oil business from 1961 to 1969 (A-344/13) and picked up the product at the premises involved in this case. (A-345/5-7). Motl's testimony, in its totality, is not worthy of belief. Although he was occupied as a taxi driver for years after he went out of the oil business (A-355/9-22), he testified, in response to a sequence of leading questions, to observing frequent instances of oil spillage, both during the period prior to 1969 (which is immaterial to this case) and subsequent thereto. His testimony as to the time of any given event can be described as "homogenized", and he gave cursory, rather than factually specific, testimony as to what he claimed to have observed. On cross-examination Motl admitted that from 1965 until 1969 his purchases were from Monticello Gas & Oil Co. The lack of veracity of Motl's testimony was revealed by his account of visits to the oil storage plant and conversations with working personnel thereat during the period from February 1973 until September of 1973 when dismantling of the plant was in process (A-368/16 - A-370/25), when, in fact, MGO and its personnel had vacated the plant on February 10, 1973 (A-430/5-8-A-442/6).

The testimony of John Kwak of the State Department of Environmental Conservation was read into evidence (A-3801-A-415/3) and a report (E-3) based on his observations on April 13, 1972 (E-5), a date prior to the general release delivered by plaintiff, was marked into evidence. By redaction, portions of an exhibit showing efforts by the Conservation Department to obtain voluntary compliance by Monticello Gas & Oil (E-15) and the lack of cooperation by the latter (E-16) were deleted. Kwak's testimony related to events in April 1972 (A-386/7-25), which antedated the release which was delivered by Doralee to Cities Service. Kwak testified that the emission of oil from the storage plant was due to the manner in which it was operated and that oil emissions are due to "operational mismanagement". (A-396/17 - A-397/12). There is no doubt on the trial record that MGO alone was the operator of the plant; the court so charged (A-1267/8-11). Kwak testified that he saw the "oil catchment system" clogged with snow (A-398/13-15), clearly an operational omission. After stating that plaintiff's exhibit 3 (E-17), a letter addressed by the State Department of Environmental Conservation to Monticello Gas & Oil Co., Inc., was being offered only against Monticello (A-405/18-19) (a legal impossibility, since it was not a defendant), the court admitted the letter, in redacted form, against Cities Service. (A-406/10-23). The letter bears a date prior to the general release delivered by Doralee in the prior state court action.

MGO, which was not sued by plaintiff, was charged by the Environmental Conservation Department of New York State with the pollution of which the plaintiff complains, and MGO consented to an order imposing a $500.00 fine on such charge (E-51-E-52). Although Cities Service was not a party to the pollution proceeding against MGO, the document relating to the charge, and various other documents making reference thereto were admitted as against Cities Service over the objection of its counsel. (A-409/22-A-410/2). The court made reference to it during summation and read extensively from the New York State statutes relating to pollution, notwithstanding the fact that Cities Service had not been charged with, or found guilty of, any such offense. (A-1283/9-A-1285/11). It was conceded by plaintiff's counsel that by October 1973 everything had been done so far as oil emission was concerned. (A-412/11-17).

In further support of its case, the plaintiff offered in evidence a copy of a report of J. G. Spodaryk, an analytical chemist of the State Department of Environmental Conservation, relating to investigations and observations made on April 19 and 20, 1972 - dates prior to the general release issued by plaintiff to Cities Service -- in connection with a so-called "fish kill". (E-74-E-81). The Spodaryk report shows that in all instances in which a test minnow was placed in samples of the waters drawn from the vicinity of plaintiff's premises, they recovered fully from any initial distress (E-77-E-78) and this was conceded

by plaintiff's counsel. (A-626/2-3). Spodaryk's deposition testimony read into evidence was to the effect that the water samples showed an oxygen content of 8.72 parts per million as against a minimal life maintenance requirement of only 3 or 4 parts per million (A-618/7 - A-619/3), clear proof that there was no pollution inimical to fish life. Indeed, a wholly disinterested witness, Sedleck, who was employed as a pipe-layer during the construction of the Village of Monticello sewer line through plaintiff's property, testified that he saw lots of fish in the pond, that he and fellow workers took a substantial number of fish and that he saw lots of fish go downstream through the outlet pipe from the Doralee ponds. (A-1148/2-24).

In direct contradiction of plaintiff's witness Rosch, Sedleck testified that although the lake bottom was mucky, it had no oil (A-1148/25-A-1149/11). Sedleck also testified that his company, by bulldozer, removed the very stumps and muck (A-1149/14- A-1150/10) that plaintiff's witness, Rosch, said would cost $21,000 to remove.

Plaintiff adduced proof to show the difference between the rents received by plaintiff from its tenants as compared with summer rental rates allegedly charged at other bungalow colonies in the general area. This proof was offered through a real estate broker, William Edison, who testified that he obtained the 1976 rent roll of plain-

tiff's bungalow colony from Mrs. Huss and plaintiff's attorney, (A-502/2-6; A-507/6-11) and that he went to various other bungalow colonies in the area and was told what the rental charges were at those other facilities. (A-508/19 - A-509/4). The witness was then permitted by the court to average the rentals at the five other bungalow colonies and compare them with the amounts charged by Doralee. (A-510/21 - A-511/10). By a remarkable process of extrapolating annual rent increases of $50 by Doralee as compared with $150 or $175 by the other bungalow colonies, the witness worked backwards to hypothetical rents for the years 1973 to 1976. (A-511/11-25). The witness admitted that he did nothing but compare, arithmetically, the rent figures as given him by others. (A-533/A-537/16). He did not make verifications of the rents (A-524/2-6; A-566/19-25-A-567/2-19), and he was in no way concerned with how the Doralee premises compared, physically or otherwise, with the five other bungalow colonies. (A-547/22-25; A-548/4-13).

There was undisputed proof from plaintiff's own records that most of its summer tenants were "repeaters" who renewed their leases from year to year (E-126; E-130). Indeed, it was conceded by plaintiff's counsel that 80% of the Doralee tenants fell into this category. (E-126; E-130; A-926/4-20). Plaintiff's rent income increased progressively from year to year during the period of alleged pollution. (E-98).

The proof in this case also showed written claims by the plaintiff that its premises were polluted by raw sewage which was released by a number of premises, other than the MGO storage plant, in the vicinity of plaintiff's premises (E-87-E-96; A-815/25-A-819/23), and that the sewage could be seen and smelled. (A-686/12-16-A-688/4-11). There was also proof in the record of oil emanating from another petroleum facility in the vicinity of plaintiff's premises (A-273/17-24), as well as from the highway adjacement thereto. (A-273/9-12; A-273/16-24; A-301/12-A-302/14).

Plaintiff sued Cities Service and MGO in the New York State Supreme Court for pollution alleged to have occurred during the years 1967 through 1972. In settling this claim for $12,500 by a stipulation made in open court on April 25, 1972, the plaintiff delivered a general release to Cities Service from all liability through October 24, 1972 (E-116-E-120). The plaintiff also sued the Village of Monticello for alleged diminution of the value of its property and of its rental income in connection with the construction of a sewer line through a right of way which had been sold by plaintiff to the Village.

The plaintiff bought its property in 1967 for only $70,000. It was awarded compensatory damages of $60,000 and punitive damages of $200,000.

The case was tried during a time when the newspaper and broadcast media were replete with items involving oil pollution resulting from tanker collisions and ruptures.

ARGUMENT

SUMMARY OF ARGUMENT

Simply stated, this is a case wherein the plaintiff seeks to charge Cities Service with liability for nuisance, trespass and negligence by reason of damage alleged to have been sustained through the emission of oil wastes from an oil storage plant which admittedly was under the sole control and operation of the third-party defendant MGO. The court also permitted amendment of the complaint to plead a new claim - that Cities Service had breached a settlement agreement made in the prior state court action wherein plaintiff had asserted the selfsame claims against Cities Service and MGO for the years 1967 to 1972.

Cities Service makes the following arguments:

(a) It can have no liability to plaintiff for trespass, nuisance or negligence under the undisputed circumstances that MGO was in sole control of the oil storage plant, particularly where it was shown by the findings of the New York State Department of Environmental Conservation that the oil emissions were the result of operational deficiencies, such as failure to remove snow and dirt from the oil separator, which can be attributed only to MGO.

The court introduced into the case the claim that Cities Service had breached the agreement of settlement made in the state Supreme Court action on April 25, 1972. The undisputed proof showed that there was no breach of that agreement. The settlement agreement provided that the defendants were to submit by a certain date plans for the construction of an oil separator system and, alternatively, either construct the system or discontinue operation of the oil plant. The undisputed proof shows that a timely submission of the plans was made to the state court judge and that the operation of the oil plant was discontinued on February 10, 1973, months before plaintiff's 1973 rental season commenced. Moreover, there was no proof whatsoever as to what would have been the damages attaching to the breach of the settlement agreement considering, particularly, that the separator construction plans were submitted by October 31, 1972 (on June 23, 1972) and the plant was vacated by February 10, 1973.

(b) Cities Service held a lease with MGO in which MGO agreed to maintain the premises and to defend, indemnify and hold harmless Cities Service from any and all claims relating to the use and operation of the premises. Cities Service claims that it was entitled to indemnification under this contractual undertaking by MGO, as well as indemnification at common law by reason of the active involvement of MGO in the liability claimed by plaintiff and the complete passivity and

detachment of Cities Service from the causes of any such liability. The court's order dismissing the third party claim of Cities Service against MGO is asserted to be clear error.

(c) Apart from the contention that Cities Service's detachment from operating responsibility relieves it of liability to the plaintiff, Cities Service further contends that there was no competent proof adduced by plaintiff to show liability on anyone's part. In the prior state court action, the plaintiff delivered to Cities Service and to MGO a general release dated April 25, 1972 resulting from claims for the period 1965 through October 24, 1972. All of plaintiff's proof, except for the testimony of Robert Rosch, relating to oil emission and "fish kills" was based on observations prior to the date of the April 25, 1972 general release delivered by plaintiff. Self-evidently, such proof could not establish liability in the instant case. The witness Rosch testified that, in September 1972, when the pond on plaintiff's premises had been drained, he saw what appeared to be oily muck on the lake bottom. However, he acknowledged that no tests had been made to determine the presence of oil, that he had no expert competence to identify oil as such, and that he was aware that oil floated on the surface of water and could not fall to the bottom of the pond. Rosch further admitted that the pond bottom was covered with decayed vegetation. Rosch's testimony was with respect to an observation made prior to the exoneration date of October 24, 1972 contained in the general release

delivered by plaintiff and therefor does not constitute competent proof in this case. Moreover, his testimony did not establish the presence of oil on the pond bottom or the need or justification, for such reason, to expend any sum to dredge away or remove the pond bottom. Other witnesses, Hudson and Motl, testified to events preceding the date of plaintiff's release, and on the face of their testimony, were neither reliable nor credible.

(d) Plaintiff failed to adduce any competent proof of damage. Insofar as Rosch established a figure - $21,000 - as the cost of dredging away the pond bottom, that figure stands isolated and without probative effect because there was no proof to establish the need for such dredging and there was no proof to show, as required by established authority, that such alleged restoration cost did not exceed the diminution in value of plaintiff's premises by reason of the alleged oil pollution. Plaintiff, on the record, renounced any claim for diminution in value of the premises, which it was a competent legal basis of a damage claim and adduced no such proof. Instead, plaintiff tried to establish through a real estate broker, Edison, a loss of rent income. Such line of proof was unfounded in law and insufficient in fact. Edison testified that he ascertained the rents at plaintiff's bungalow colony for the year 1976 and the rents at five other bungalow colonies for the like

year, as well as the amounts of annual escalation between 1973 and 1976 and that, by extrapolation of the escalation figures, he had arrived at the rents for the years from 1973 to 1976. Edison admitted that he did not take into account, in any way, the differences between the Doralee premises and the five other bungalow colonies. This made his proof meaningless, since he was doing no more than comparing, arithmetically, the alleged rent figures for Doralee and those of the other bungalow colonies. Moreover, the time period dealt with by Edison postdated the filing of this action in February 1973, thus being incompetent for all purposes, since damage in an action at law runs to the date of filing of the complaint. In this particular case, the only cognizable period for the evaluation of damage was the period between October 24, 1972, the effective date of the release delivered by plaintiff and the date of filing of this suit, a period of four months.

(e) The court submitted the question of punitive damages to the jury, notwithstanding the clear proof that Cities Service did not operate the oil plant and had no lease resonsibility in respect of its maintenance, other than to effect structural repairs, as well as the undisputed fact that the Department of Environmental Conservation attributed the oil emissions to operational deficiencies on the part of MGO. On such proof, and on the absence of proof that any officers, directors or policy level officials of Cities Service were aware of and approved or condoned any wanton or

reckless acts of Cities Service, there was no basis for submitting the question of punitive damages to the jury.

(f) The court, in the handling of the case, made certain rulings which, if not reflective of prejudice to Cities Service, nevertheless resulted in great prejudice to its right to a fair trial. The sum total of such rulings and action by the court was to so prejudice the cause of Cities Service as to require a reversal of the verdict and judgment.

I

THE VERDICT WAS CONTRARY TO THE EVIDENCE AND THE LAW; THE TRIAL COURT SHOULD HAVE DIRECTED A VERDICT AGAINST DORALEE OR GRANTED THE MOTIONS OF CITIES SERVICE TO SET ASIDE THE VERDICT AND FOR JUDGMENT OF DISMISSAL N.O.V.

Doralee claimed in this action that oil seeping from a petroleum storage plant ultimately reached its premises and that this constituted a nuisance (A-7), a trespass (A-8), and negligence. (A-8). The alleged source of this oil was the MGO bulk storage facility on Cold Spring Road in Monticello, New York. Cities Service leased these premises to the third-party defendants MGO under a lease (E-104) which invested MGO with sole possession and control of the premises and provided that all repairs, other than structural, were to be effected by the tenant. The MGO general manager, Sam Greene, testified

that, from 1969 or 1970 and thereafter, all sales from the oil plant were made and billed by MGO (A-437/8-20), and that there were no Cities Service personnel at the plant. (A-435/3-5; A-436/25-437/3).

The law is well settled that to hold an owner of real property liable in tort (the complaint herein alleges tort liability - nuisance, trespass and negligence), it is necessary to show that the owner occupied and controlled the premises. In the words of the New York Court of Appeals in Dick v. Sunbright Steam Laundry Corp., 307 N.Y. 422, 424, 121 N.E.2d 399, 401 (1954) "[S]uch a [tort] liability is an incident to occupation and control....". See also, Roark v. Hunting, 24 N.Y.2d 470, 301 N.Y.S.2d 59, 248 N.E.2d 896 (1969) and People v. Scott, 26 N.Y.2d 286, 309 N.Y.S.2d 919, 258 N.E.2d 206 (1970) which, at page 290 summarizes the law and authorities relating to the non-liability of a landlord in the absence of control of the premises. There was no proof in this case that Cities Service had possession or control of the premises or any participation in its operations. To the contrary, it was established that MGO, as lessee, had sole possession and control of the oil plant and, in fact, had been the owner and operator of the plant for many years until it sold the premises to Cities Service in 1957 and concurrently leased them as tenant, with no interruption of MGO's possession and control. (E-2[illegible], ¶1). The court charged that MGO operated the plant. (A-1267/8-11).

Trespass liability arises from an intentional harm. Phillips v. Sun Oil Co., 307 N.Y. 328, 121 N.E.2d 249 (1954), nuisance liablity derives from acts or omissions of the party in control of premises, Davis v. Niagara Falls Tower Co., 171 N.Y. 336, 64 N.E. 4 (1902); Cogswell v. New York, New Haven and Hartford Railroad Co., 103 N.Y. 10, 8 N.E. 537 (1886); 42 N.Y. Jur., Nuisances §§1-3, and negligence liability arises only from breach of duty by the party in possession and control of premises. Roark, supra; see generally, Kimbar v. Estis, 1 N.Y.2d 399, 153 N.Y.S.2d 197, 135 N.E.2d 708 (1956). In this case, it is undisputed that MGO alone was in possession of the premises and in control of its day-to-day operations. MGO was required to perform all maintenance and repairs, except structural. Indeed, the proof in respect of the acts and omissions allegedly causing the oil emissions was to the effect that MGO permitted the oil separator to become clogged with snow and dirt (A-397/10-398/15, A-399/9-14) and that oil trucks at times had been overfilled, with a resulting spillage of oil. (A-353/6-354/5). Such acts and omissions are chargeable only against MGO as sole operator of the premises; they do not support a prima facie case against Cities Service, which admittedly had no presence at the premises. (A-435/3-5, A-436/25-437/3). Cities Service had no obligation to make repairs, other than structural repairs, and none of the structural repairs made by it, such as painting the oil tanks, repairing the roof, or replacing an electric motor (A-444/6-10),

had any relevance to or could have been causative of, the leakage of oil from the storage plant.

The complaint herein pleaded a claim by the plaintiff for rescission of the settlement agreement that it had made in the prior state Supreme Court action. (A-11). The trial judge affirmatively intervened to suggest that the plaintiff's claim herein was for breach of the prior settlement agreement (A-648/4-A-649/8) - a complete reversal of the position that had been asserted by the plaintiff up to that point. Assuming that such additional cause of action had been brought into the case and could constitute a basis of recovery by the plaintiff, it is pointed out that no breach of the stipulation of settlement was established. On the contrary, the trial record establishes that the defendants in the prior Supreme Court case made a timely submission (E-119) to the court of the oil separator plans called for by the stipulation of settlement (E-143) and the record is clear that the use of the oil storage plant was abandoned on February 10, 1973. (A-477/5-14). The stipulation prescribed no date by which the discontinuance of plant use was to come about and it was entirely reasonable and timely that such abandonment of plant use should have occurred on February 10, during the winter season when plaintiff's premises were not occupied by summer tenants whose possession usually commenced about the Fourth of July weekend each year. (A 520/12-13).

The court permitted considerable proof to enter

the case which was entirely irrelevant and of substantial prejudice to Cities Service. For example, the court permitted Doralee's proof that MGO had agreed to a Consent Order in a proceeding instituted by the New York State Department of Environmental Conservation against MGO alone (E-45-E-47 and E-51-E-54) and that MGO had acquiesced in the imposition of a $500 fine against it. Not only did the court permit the introduction into evidence of this highly prejudicial document relating to a proceeding to which Cities Service was r party, but it also allowed, and even participated in (.. 19/17), interrogation of Sam Greene, MGO's manager, by Doralee's counsel as to (1) whether he (Greene) expected Cities Service to pay the fine levied on MGO and (2) whether Greene thought that Cities Service might have been fined a larger sum than $500 if it had been a party to the Environmental Conservation Department proceeding. (A-419/5-20; E-20).

A good deal of proof entered the record with respect to a "Water Pollution Case Report" (E-3 through E-9), which the court redacted to a considerable extent (the unredacted version appears at E-10 - E-16). The redaction involved the deletion from the report of paragraph fourteen (E-15), which showed that the efforts of the Department to obtain compliance were solely with Monticello Gas & Oil Co., Inc., of the statement in paragraph seventeen (E-16) that "[T]he management of Monticello Gas & Oil has been totally uncooperative..."

and of the Department's attribution of responsibility to MGO in naming "Monticello Gas & Oil" as the operating polluter. (E-10).

Even more important in respect of this highly prejudicial report is the fact that it is based upon an observation made on April 13, 1972 (E-12), which is earlier than the date of the general release delivered by Doralee to Cities Service and MGO in the prior state court action, (E 85), which fact necessarily places all events recited in the report under the exoneration conferred by the release.

Interestingly enough, the official report made by Spodaryk of the New York State Environmental Conservation Department showed the survival in good condition of every test minnow placed in water samples drawn from areas between the MGO plant and plaintiff's premises. Self-evidently, the waters were not polluted to any degree which was inimical to fish life. (E-77-E-79). Moreover, the state expert testified that the waters had an oxygen content of 8.72 parts per million as against the minimal requirements of only 3 or 4 parts per million that was sufficient for maintenance of fish life. (A-618/7-A-619/3). That the test minnows were "all right" after the test was conceded by plaintiff's counsel. (A-626/2-3).

In connection with the grievances asserted by plaintiff in respect of oil spillage, it is highly significant

that the record herein shows that the plaintiff itself stated in writing that:

> ". . . there is a heavy discharge of raw sewage to my property. This has been traced to almost every dwelling on Cold Spring Rd. (private as well as commercial)". (E-93).

and

> "To state that it [Doralee property] is also being used as the area sewer would not be an overstatement." (A-688/4-11).

A similar statement relative to "inadequate provisions for disposing of sewage" appears in plaintiff's exhibit 63 (E-87). These admissions involve a form of pollution which is in no way asserted by plaintiff to be chargeable to Cities Service. The admitted existence of raw sewage as a pollutant concurrently with the alleged oil pollution, and the absence in this record of any proof which allocates or ascribes plaintiff's alleged damage to one or the other cause, leaves plaintiff's proof, as against Cities Service, insufficient as a matter of law. (see discussion infra at 41).

The liability issue in respect of the defendant Cities Service was seriously prejudiced by the court's admission into evidence of documents and memoranda of the New York State Conservation Department and of Cities Service which were in no way relevant to, or probative of, liability. For example, exhibit 4 is a memorandum dated April 8, 1973 (E-

20-21), which is substantially subsequent to the initiation of this law suit and relates to the Department of Conservation proceedings and the consent order involving MGO. The memorandum contains the phrase "Sam [Greene] claims that if Citgo was represented the fine would have been much more. In fact the law provides up to $2,500 per day". This irrelevant memorandum, and the speculation as to what would have been the penalty on Cities Service if it had been a party (which it was not), had the inevitable effect of improperly linking Cities Service to the offense for which MGO was fined, and as to which Cities Service was not involved. The court admitted, after redaction, plaintiff's exhibit 5 (E-22-24) which is a Cities Service construction requisition proposing to sell the premises to Monticello Gas & Oil for the sum of $1.00. This memorandum has no relevance to the claims made by the plaintiff and contains no admission of liability; it refers only to a proposed sale of the oil terminal. Nevertheless, in common with the documents previously mentioned, and those which will be hereafter referred to, the admission of this document into evidence could have no effect on the jury other than to engender and fortify the inference that Cities Service - rather than MGO (whom plaintiff had elected not to sue) - was the party responsible for the conditions alleged by the plaintiff.

Exhibits 6 (E-27), 7 (E-30-31), 8 (E-32), 9 (E-33), 10 (E-34-36), 12 (E-37-38), 13 (E-39), 14 (E-40-41), 17 (E-42), 18 (E-43-44) and 20 (E-49-50), are, like those pre-

viously referred to, documents, of, or involving, Cities Service which postdate the institution of this suit and serve no evidentiary purpose except to carry to the jury an erroneous and unwarranted implication that Cities Service was involved with, and responsible for, the damage claimed by plaintiff.

The plaintiff adduced no proof whatsoever to establish that Cities Service controlled or had any share in the day-to-day operations of the MGO oil plant. Indeed, the proof from MGO's manager was to the effect that there were no Cities Service personnel present at the plant. (A-436/25-437/3). The lease under which MGO held the premises, Exhibit B (E-104-E-109), explicitly required it to make all repairs and do all maintenance, except structural (E-105, ¶16 and E-107). Under well established law, Cities Service was not, and could not be held, liable to plaintiff. Dick v. Sunbright Steam Laundry Corp., supra; Roark v. Hunting, supra; and People v. Scott, supra. As has been pointed out in the Statement of Facts, the testimony of Department of Conservation employees, and the exhibits based thereon related, without exception, to the acts and culpability of MGO and in general involved matters covered by the release delivered by plaintiff to Cities Service.

In the court's scattershot approach to the question of liability, as evidenced by its admission into evidence of the numerous documents mentioned above, it also admitted into evidence plaintiff's exhibit 60 (E-82-86),

which is a stipulation of settlement of the prior lawsuit instituted in the Supreme Court, Sullivan County, by plaintiff against MGO and Cities Service. The court below said in respect of the stipulation:

> If there is a breach of that commitment, isn't it the same as if they [Cities Service] were there every day helping to pump the trucks?

(A-329/2-3). In the same colloquy the court imputes to Cities Service a vicarious responsibility for operation and control of MGO's plant in stating with regard to the stipulation of settlement:

> But Cities Service has committed itself to participate in the operation and control of that premises by agreeing to do certain things.

(A-329/13-15). So free-wheeling is the court's viewpoint on liability that it stated:

> It [Cities service] said: We are going to get rid of this oil; we are going to do this and that to stop it.
>
> It does not stop and the oil keeps going. That's Cities Service' trespass.

(A-330/7-10). It is self-evident from this colloquy that the court converted an agreement of settlement, which is not cognizable as proof of liability, into an acknowledgment of operation and control by Cities Service of premises that were

clearly under the sole operation and control of MGO. Such a treatment of tne settlement is clearly erroneous. Schenker v. Bourne, 278 App. Div. 699, 102 N.Y.S.2d 928 (2d Dep't 1951); Woodland v. Cote, 252 App. Div. 254, 299 N.Y.S. 742 (3d Dep't 1937). This judicial perspective is particularly important in light of the circumstance that MGO was not sued by plaintiff in this action, so that plaintiff's case against Cities Service would necessarily collapse unless Cities Service were smeared with the tar of MGO's responsibility.

There was no claim in the complaint that Cities Service was liable to plaintiff because it had breached the agreement in the prior stipulation of settlement to either install an oil separator system as approved by the court, or else discontinue operation of the storage plant. (E-83). To the contrary, the plaintiff pleaded in its complaint a claim to vacate and set aside the settlement of the prior action. (A-12). Nevertheless, the trial judge herein, virtually of his own motion (A-854/7-A-857/4) proceeded as though this case were one in which it was claimed that liability devolved from a breach of the prior stipulation of settlement. The court submitted to the jury the pleaded claim of breach of the settlement agreement, notwithstanding Exhibit CC (E-143), which showed that Cities Service timely complied with the stipulation requirement to submit plans to the court and the undisputed proof that, as provided by the stipulation of settlement, MGO, on February 10, 1973, discontinued operation

of the oil plant and moved to another oil terminal which it had commenced building in April or May 1972, immediately after effecting the stipulation of settlement (A 442/10-13). The complaint herein was dated February 28, 1973, almost three weeks after operations ceased at the bulk plant. (A-12).

The proof in this case failed utterly to connect Cities Service, under any of the pleaded theories of liability claimed by plaintiff - nuisance, trespass and negligence (or even the breach of contract concept contributed by the Court) with responsibility for the damage claimed by plaintiff. The trial judge should have granted the motion of Cities Service for a directed verdict in its favor. For the same reasons, it should have granted the motion of Cities Service to set aside the verdict, or for judgment N.O.V. in its favor.

II

THE TRIAL COURT ERRED IN DISMISSING THE THIRD-PARTY CLAIM OF CITIES SERVICE AGAINST MGO

The written lease by which MGO held possession of the oil terminal under Cities Service contained an indemnity provision whereunder:

> Tenant agrees to defend, indemnify and save harmless the Landlord from any and all claims, demands, suits, actions, judgments and recoveries for or on account of damage or injury (including death) to property or person of himself, his family, servants, agents or any other person, firm or corporation, caused by or due to the condition or use of said premises or the streets or roads on which they abut.

(E-105, ¶8). On the basis of this indemnification, Cities Service pleaded a third-party claim against MGO seeking recovery to the extent of any liability that might be imposed on Cities Service under the claims of Doralee.

The court granted the motion of the third-party defendant to dismiss on the authority of McLean v. L.P.W. Realty Corp., 507 F.2d 1032 (2d Cir. 1974). (A-1080/8-10). McLean was a case in which McLean, an employee of a sub-contractor, was injured while working on a job where Beaman Corporation, the primary contractor, was performing improvements. Mclean v. L.P.W. Realty Corp., supra. These improvements were being made at the instance of Gulf Oil Corporation on a service station which it leased to one Joseph James. McLean recovered damages from Gulf and Gulf, in turn, was accorded full indemnification from Beaman under a contractual indemnity clause in the contract between Gulf and Beaman. Beaman, primarily, and Gulf, secondarily, appealed from the District Court's denial of the claims of Beaman and Gulf against James for indemnity. The per curiam decision of this court refers to the possible liability to Gulf of the tenant, James, in the following way:

> In the district court, Gulf unsuccessfully claimed indemnification from James under a hold-harmless clause in the station lease. In this court, Gulf and Beaman argue that the rejection of Gulf's claim was error. We doubt that Beaman has standing to raise this issue at all, and Gulf's appeal has been dismissed for failure to prosecute.

Id. at 1033. Notwithstanding the fact that Beaman, which was not a party to the lease between Gulf and James, lacked standing to claim that Gulf had the right to indemnification from James, and notwithstanding that the dismissal of Gulf's appeal from the lower court denial of Gulf's indemnification claim against James withdrew from the court the power to decide the appeal, the Court of Appeals proceeded, in what was clearly an obiter dictum, to express an opinion on the enforceability of the indemnification claim which was no longer before the court. A reading of the decision of this court makes it clear that, even in terms of what was patently obiter dictum, it arrived at neither a definitive nor positive expression of views. Rather, this court stated:

> But while the law of New York is not crystal clear at the moment, we believe that the New York courts would regard enforcement of this indemnification clause as unconscionable. Were it not for diversity jurisdiction, these defendants might have had rulings on the matter from more authoritative sources.

Id. at 1034.

The trial judge herein requested Cities Service counsel to explain why the McLean case did not require dismissal of the third-party claim against MGO; the explanation and analysis of the case appears at A-1080/14-A-1082/6. Essentially, Cities Service's counsel argued that the instant case does not involve "exoneration" or exemption of Cities Service from liability to MGO (A-1081/18-20), but rather, a demand for performance by MGO of an undertaking to indemnify Cities

Service against the claims made in this case by a third party, Doralee.

The only New York case holding an indemnification provision between tenant and landlord to be void is Redding v. Gulf Oil Corporation, 38 App. Div. 2d 850, 330 N.Y.S. 2d 158 (2d Dep't 1972), where the enforcement of the indemnity provision in respect of a claim of the plaintiff-tenant would have been tantamount to a lease provision exempting the defendant-landlord from liability for its own negligence - an obvious violation of New York General Obligations Law §5-321. In the instant case, the enforcement of the indemnification agreement assumed by MGO would have no such effect; MGO makes no claim against Cities Service and, indeed, MGO is clearly the active party in bringing about the events on which plaintiff's claim is based.

The cases, other than McLean, that were argued to the trial court in support of MGO's motion to dismiss the third-party complaint (A-1090/23-A-1091/20) do not in any way support the motion to dismiss. International Underwear Corporation v. Brooklyn Trust Co., 287 N.Y. 589, 38 N.E.2d 386 (1941), Billy Knitwear Inc. v. New York Life Ins. Company, 288 N.Y. 682, 43 N.E. 2d 80 (1942), Jones v. Railroad Fed. Savings & Loan Ass'n, 264 App. Div. 725, 34 N.Y.S. 2d 70 (2d Dep't 1942) and C.B. Bullock v. Sinclair Refining Co., 164 N.Y.S. 2d 452 (Sup. Ct. 1956) are cases in which a landlord pleaded, as a defense

against a tenant's claim, that a lease provision exonerated the landlord from liability for its own negligence. In each case it was correctly held that the landlord's defense was insufficient in law because it was violative of former §234 of the Real Property Law, the predecessor to N.Y.G.O.L. §5-321. No such provision, and no such facts, are involved in this case.

Counsel for the third-party defendant argued two cases on common law indemnification - Harrington v. 615 West Corp., 2 N.Y. 2d 476, 161 N.Y.S.2d 106, 141 N.E. 2d 602 (1957) and Adler v. Tully and DiNapoli, Inc., 300 N.Y. 662, 91 N.E.2d 323 (1950) - which had no applicability in the instant case since each involved a determination that the third-party claimant was not entitled to common law indemnification because it was at fault together with the third-party defendant. In the instant case, the proof is clear that any acts or omissions that may have resulted in the emission of oil from the storage plant are chargeable to MGO alone.

Cities Service, therefore, submits that neither McLean nor the other cases cited in support of MGO's motion to dismiss the third-party claim, constitute decisions which are in point of, or controlling in, the instant case. Further, it is submitted, with all respect, that to the extent that this court indicated a viewpoint in the McLean case on the applicability of the New York General Obligations Law, §5-321 to a situation in which a tenant contractually agrees to indemnify a

landlord against liability to a third party (but not the tenant) it erred in suggesting that such an indemnification is not binding. Section 5-321 of the General Obligations Law does not deal with agreements of indemnification but, rather, with self-exculpatory agreements whereunder a landlord attempts to exonerate or exculpate itself from liability, for its own acts, to its tenant. The section comes into play in respect of an agreement of indemnification where the indemnification is expressed in terms which are broad enough to apply to claims and injuries of the tenant caused by the landlord's negligence. In such circumstances, the indemnification self-evidently takes on the character of an exoneration, exemption or self-exculpation of the landlord. This is made clear in the case of Redding v. Gulf Oil Corporation, supra, where the court said:

> "We therefore hold that, insofar as this indemnity provision may be construed as applying to an injury sustained by the lessee himself, it is, in effect, an agreement exempting the lessor from liability for its own negligence and at least to that extent it is contrary to public policy and void under section 5-321 of the General Obligations Law (citing cases)." (emphasis supplied).

Id. at 851, 330 N.Y.S.2d at 161. However, as between the lessor and a third party the same considerations do not arise. See, Lake v. Watertown National Bank, 31 Misc. 2d 336, 219 N.Y.S.2d 1021 (Sup. Ct. 1961) (a case decided under Real Property Law §234); Nixon v. Genung's Inc., 84 N.Y.S. 2d 892 (Sup. Ct.

1948); and, Mirsky v. Seaich Realty Co., 256 App. Div. 658, 11 N.Y.S. 2d 191 (1st Dep't 1939).

The cases dealing with lease indemnification provisions involving claims of third parties, as distinguished from claims of the tenant itself, sustain the validity and enforceability of the indemnification provision. Levine v. Shell Oil Company, 28 N.Y. 2d 205, 321 N.Y.S. 2d 81, 269 N.E. 2d 799 (1971) is a case on all fours with the instant case. In Levine, the employee of a gas station leased by Shell Oil to one Visconti recovered judgment against Shell. Shell, in turn, recovered judgment on its third-party action against Visconti based on a provision of the lease whereunder Visconti indemnified Shell against claims related to the "condition, maintenance, possession or use [of the premises] or the operations thereon". The trial court ruled that Visconti had specifically agreed to indemnify Shell as to claims of third parties against its own active negligence. On appeal, a divided Appellate Division reversed this finding and dismissed the third-party claim. The Court of Appeals stated its agreement with the trial judge and reinstated the judgment of the trial court. The indemnity provision contained in the lease between Cities and MGO closely parallels the provision between Shell and Visconti and is fully as comprehensive in expressing an indemnification for "any and all liability". As stated by the New York Court of Appeals:

> Although we have no conceptual difficulty with such a rationale [strict construction of indemnity agreements] we do question the feasibility of a rule which allows a court to conclude that where a contract provides that indemnification will be for any and all liability, the parties must have meant something else. (citing cases).

Id. at 211, 321 N.Y.S. 2d at 85, 269 N.E.2d at 802. The above quotation from the court's decision in Levine, supra, is followed by an extensive citation of cases wherein language of indemnity of even lesser amplitude than the provisions in Levine and in the instant case were found sufficient to impose liability on the indemnitor, even where active negligence of the indemnitee is involved. In Levine, the Court of Appeals further said:

> The clause, in the instant case, clearly states that Visconti will be required to indemnify Shell against all claims, suits, loss, cost and liability. Since the plain meaning of these words fairly includes the liability for the active negligence of Shell, we see no reason why more should be required to establish the unmistakable intent of the parties. A contrary construction would result in the conclusion that the clause was a nullity. Surely, this could not have been the intent of the parties. (citing cases).

Id. at 212-213, 321 N.Y.S.2d at 86, 269 N.E.2d at 802-803. The above quoted rationale is applicable to the instant case which involves a lease indemnity provision which is closely similar to the one construed in Levine. On June 16, 1977, a unanimous New York State Court of Appeals in Hogeland v. Sibley, Lindsay & Curr Co., ___ N.Y.2d ____ (Ct. App., June

16, 1977), reaffirmed the principle of Levine. [A copy of the Hogeland decision is appended to this brief.].

A parenthetical observation may be appropriate in respect of Levine and the cases cited therein, insofar as they concern §5-321 of the New York General Obligations Law, and its progenitor, §234 of the Real Property Law, which has been on the statute books since 1937. The decisions involving demands for indemnification by landlords from tenants under lease indemnity provisions where claims by third parties against the landlord were involved, have not brought into question either the former §234 of the Real Property Law or the present §5-321 of the General Obligaitons Law. This is for the obvious reason that these statutes had no applicability to such claims for indemnification. The statutes relate only to lease provisions which have the effect of exculpating or exonerating a landlord from its own negligence vis-a-vis the tenant. A typical such situation is dealt with in Redding v. Gulf Oil Corporation, supra, where the court held that a landlord could not exonerate itself from liability to its own tenant by invoking a lease indemnity commitment of the tenant against the tenant's own claim.

It is submitted that the trial court erred in dismissing the third-party claim based on the indemnity obligation of MGO. Moreover, the record shows clearly that MGO was the active party in creating or permitting the conditions

alleged by plaintiff. Upon this clear showing, and upon the amendment of the third-party complaint during trial to allege a claim for common-law indemnification (A-1096/9-16), there was a basis in the proof and on the law for finding Cities Service entitled to common law, as well as contractual, indemnification. Assuming, arguendo, that Cities Service were partly at fault, MGO was bound into the case for a finding as to its share of liability under Dole v. Dow Chemical Co., 30 N.Y.2d 143, 331 N.Y.S.2d 382, 282 N.E.2d 288 (1972).*

The court clearly erred in dismissing the third party claims of Cities Service against MGO and Monticello Oil & Gas Co.

III

THE PLAINTIFF FAILED TO ESTABLISH DAMAGES

The complaint stated claims by Doralee for damages in the amount of $12,500** for the period from 1965 to April 25, 1972, for $100,000 permanent damages for diminution of the value of property for the period from and after April 25, 1972, for consequential damages of $12,500 for the period after April

*In this regard, it should be noted that the instant complaint, answer and third-party complaint and third party answer were filed prior to the Dole decision in 1972.

**Set off against this claim of $12,500 is the like amount paid by Cities Service and MGO pursuant to the stipulation of settlement dated April 25, 1972.

25, 1972 [A-9-10) (4th, 5th and 6th cause of action)], and for punitive damages. (A-8 - A-12). The question of the propriety of the punitive damages awarded below is discussed infra, at 45. The trial court dismissed Doralee's claims for consequential damages. (A-850/12-13).

(a) Plaintiff's Proof Failed to Distinguish Independent Causes of Damage from the Damage Claimed in this Case.

There was proof in this case which establishes, without contradiction, that plaintiff's premises were polluted by several independent causes. It is alleged in this suit by plaintiff that oil escaped from the MGO oil plant and reached its premises. In respect to this claim, it must be borne in mind that plaintiff instituted, and settled, a prior lawsuit alleging many years of the self-same damage as is alleged in this suit. The record in this case is devoid of any proof as to the extent to which the damage now asserted by plaintiff is attributable to the seven years of pollution that was alleged in the prior lawsuit, as compared with the mere four months of pollution that may be attributed in the instant lawsuit to the period between October 24, 1972, the effective date expressed in the release issued by plaintiff, and the shutdown of plant operations on February 10, 1973.

The plaintiff has claimed that its premises were

polluted by raw sewage emitted by diverse sources (none of which was Cities Service or MGO). (E-87-E-90). There is nothing in the record which shows the extent, if any, to which the raw sewage was an independent contributing cause of plaintiff's alleged damage. In addition to this independent damage factor, there was proof in the record that there was another petroleum plant in the vicinity of plaintiff's premises which was also an independent contributor of oil pollution. (A-273/17-24). Automobiles operating on the highway adjacent to the plaintiff's premises were also independent contributors to plaintiff's alleged damage. (A-301/12-25-A-302/2-14). A further independent contributor to plaintiff's damage, at least as alleged by it in another lawsuit, was the village of Monticello, which plaintiff explicitly claims to have impaired the rental value of its premises. (A-888/11-A-891/18).

In the absence of proof by plaintiff which would afford a quantification or measure of the extent to which Cities Service, or any of the other contributors to plaintiff's alleged damages, is chargeable for the damages claimed by plaintiff, the plaintiff is not entitled to recover any damage. The case of Chipman v. Palmer, 77 N.Y. 51, 33 A.L.R. 566 (1879), was one in which a plaintiff sued for alleged damages resulting from the discharge of sewage into a creek by a number of separate and independent owners of premises abutting the creek. The plaintiff sued one of the owners and obtained

a verdict in th amount of $5.00. The verdict was affirmed and the Court of Appeals stated that:

> The fact that it is difficult to separate the injury done by one from the others furnishes no reason for holding that one tortfeasor should be liable for the acts of others with whom he is not acting in concert.

Id. at 54.

The decision in Chipman is cited with approval in O'Donnell v.City of Syracuse, 184 N.Y. 1, 76 N.E. 738 (1906) and it was followed in Gallon v. Hussar, et al., 172 App. Div. 393, 158 N.Y.S. 895 (2d Dep't 1916) and most recently in Ponderosa Pines, Inc. v. Queens Dairy Farm, Inc., 48 App. Div. 2d 760, 368 N.Y.S. 2d 358 (4th Dep't 1975).

(b) Doralee Did Not Prove Compensatory Damages.

Although, Doralee had claimed damages based upon alleged diminution in the value of its property in its complaint, it did not pursue this claim at trial. It renounced any such claim. (A-729/2-A-731/21). Doralee sought to prove a cost of $21,000 to remove allegedly oily material from the bottom of its pond and losses (not previously claimed) resulting from lost rentals. (A-861/16 - A-863/16).

The proper measure of damages with respect to the cost of restoration of property is either the cost of restora-

tion of the land to its former condition or the diminution in value of the property, whichever is less. Hartshorn v. Chaddock, 135 N.Y. 117, 31 N.E. 997 (1892); see also, Shemin v. City of New York, 6 App. Div. 2d 668, 180 N.Y.S. 2d 360 (1st Dep't 1958); Realty Associates v. City of New York, 1 App. Div. 2d 1048, 152 N.Y.S. 2d 766, 767, rearg. denied, 2 App. Div. 2d 812, 154 N.Y.S. 2d 843 (2d Dep't 1956). Cities Service did not waive plaintiff's obligation, under the rule of Hartshorn, to establish whether cost of restoration or diminution in value would be the lower figure. Cities Service made numerous objections to the proof regarding the cost of restoration. (A-861/16-21; A-862/5-6). Cities Service also attempted to present proof of its own and examine Doralee's witnesses regarding the question of whether there was any diminution in value of the Doralee premises because of the alleged oil pollution. (A-867/14-A-868/3; A-538/23 - A-540/25; A-541/3 - A-541/18; A-542/3; A-542/18; A-569/6-17; A-569/18-24; A-581/12-19; and see especially, A-725/3 - A-731/21; and A-822/3 - A-823/8). When Cities Service's counsel made a motion for a mistrial (at A-747), Judge Owen indicated that he had "a problem" with Cities Service's counsel's attempts to demonstrate plaintiff's original property cost as a basis of showing that there had been no diminution in the value of the property. (A 750/7-10). MGO made relevant objection to Doralee's failure to prove its damages as well. (A-866/13-16; A-906/11-14). By Doralee's counsel's own admission, there was no attempt by it to show

that the Doralee property diminished in value. (A-863/14-18). The Court stated that "that is not the theory that the case is proceeding on and it is not being given to the jury on that theory." (A-868/2-3).

Since there was no showing by plaintiff that the cost of restoring the premises did not exceed the diminution in the value thereof, the plaintiff's proof of $21,000 restoration cost must be disregarded. Hartshorn v. Chaddock, supra. If this were not so, a party might obtain recovery for a very high restoration cost in relation to a facility which suffered no diminution in value by reason of the circumstances requiring restoration (for example, damage to an obsolete structure which, if restored, would be worth no more than before restoration).

The second element of damages which Doralee attempted to prove at trial was loss of rents. The evidence introduced by Doralee to support this proposition was utterly insufficient. The only proof adduced by plaintiff in support of its rent loss claim was the testimony of Edison, a real estate broker, who had been furnished Doralee's 1976 rents (A-507/6-11) and had been furnished the rents of five other bungalow colonies (A-522/21-25) all of which, strangely, were the same. Edison's testimony showed that Doralee's rents were lower than rents at the other bungalow colonies and that Doralee had not increased rents from season to season in as

great amounts as had the other bungalow colonies, all of whom, strangely enough, had the same rate of seasonal escalation (A-511/5-21). From this data - if it may be called such - Edison, by extrapolation of the seasonal escalation, arrived at what he offered as the rents of Doralee and the other bungalow colonies for the seasons prior to 1976. (A-510/21-A-511/22; A-534/12-A/536/20). Edison admitted that he only compared "rent rolls" and that he had not taken into consideration the differences between the bungalow colonies. (A-547/24-A-548/13; A-549/6-9; A-550/25-A-551/10; and A-553/23-A-554/10). Even if this testimony were competent, it supported damages only amounting to $9,492. (E-148).

Edison's testimony as to the rents charged by the bungalow colonies was entirely hearsay. He testified that he learned of Doralee's average rental per unit in conversations with Mrs. Huss, president of the plaintiff, and with Mr. Orseck, plaintiff's counsel. (A-502/22-A-503/6; A-504/4-A-505/15. Edison did not see rent rolls for Doralee for other than 1976 - and he was incorrect in his recollection of even these 1976 rent rolls.* (A-507/7-11). Nonethless, he testified to what he was told by Mrs. Huss and Mr. Orseck regarding Dorallee rents from 1967 through 1975 and he had no independent knowledge of the facts. (A-508/10-16).

*Edison said that the 1976 rents at Doralee were $725 for a one bedroom bungalow and between $920 and $925 for a two bedroom bungalow. Plaintiff's own exhibit 66 (E-98) shows rents for 1976 to be between $745 and $770 for one bedroom units and between $895 and $1000 for two bedroom units.

The rental figures regarding the other bungalow colonies as to which Edison testified were similarly hearsay. In each case Edison asked the owner of the bungalow colony what were the rents and did not ask to see the books or relevant leases. (A-520/14-16; A-521/12-21).

Edison's testimony with regard to the rentals on all of the properties was based upon rental figures for the 1976 season. From that figure (Edison testified that each of the five "other" bungalow colonies rented its one bedroom units for $1100 and its two bedroom units for $1300 in 1976), Edison then deducted $175 per unit for each of the comparable units for each year back to and including 1972 to cover annual escalation. (A-533/12-25; A-534/1-4 - A-536/20). The $175 figure was used although Edison had testified escalation was "$150, $175." (A-511/18-A-511/19-22; A-533/16-18; A-534/7-A-536/20). Similarly, Edison testified that Mrs. Huss told him that Doralee was able to obtain only a $50 per year per unit increase. (A-511/19-25). Cities Service's counsel prepared a chart reflecting Edison's testimony regarding the rents charged at the other bungalow units and Doralee's actual rents charged from 1973 through 1976, a copy of which is reproduced at E-148. However, the court refused to admit the chart into evidence. Neverthless, the chart demonstrates that even accepting Edison's testimony at face, Doralee suffered damages in the form of lower increased rents for that period of only $9,492. In fact, based upon Edison's testimony, Doralee's

rents exceeded the rents of the so-called comparables in 1973 - after eight years of alleged oil pollution. Edison's testimony related only to the period 1973-1976 which being subsequent to the date of plaintiff's action, made it irrelevant. Thomann v. City of Rochester, 256 N.Y. 165, 176 N.E. 129 (1931). The Court denied Cities Service's motion to strike Edison's testimony (A-1177/25-A-1179/4).

A supervening consideration in relation to plaintiff's damage claim is that, by its own complaint, Doralee claims damages only for the period subsequent to the settlement and release of April 25, 1977 and that, by established law, it may recover damages only up to its filing of this suit on February 25, 1973. As to this, it was said by Judge Cardozo in Thomann v. City of Rochester, supra:

> If the remedy is at law, the plaintiff may recover the damages sustained up to the commencement of the action, and this is the limit of the recovery, except where the invasion is certain to be permanent (Dietzel v. City of New York, 218 N.Y. 270; Uline v. New York City and New Haven Railroad Co., 101 N.Y. 98).

Id. at 171, 176 N.E. at 131. Since the oil terminal ceased operations prior to the filing of this action it is self-evident, under the rule of Thomann, that if competent proof of damage had been adduced, plaintiff's damages would be miniscule, if anything at all. Cities Service made frequent objection to proof antedating the release given by plaintiff and post-dating the institution of this action. (A-193/4-12; A-195/22-24; A-326/12-18; A-333/17-22; A-335/17-21; A-338/11-13; A-339/10-17; and A-341/24-11, et al.).

IV

THE COURT SHOULD NOT HAVE SUBMITTED THE QUESTION OF PUNITIVE DAMAGES TO THE JURY.

Plaintiff's right to punitive damages was not proven. The trial court should not have submitted the question of punitive damages to the jury because no malicious act or conduct was proved against Cities Service. Such underlying conduct on the part of Cities Service is a prerequisite for the allowance of punitive damages against it. Walker v. Sheldon, 10 N.Y. 2d 401, 223 N.Y.S. 2d 488, 179 N.E. 2d 497 (1961); Padavan v. Clemente, 43 App. Div. 2d 729, 350 N.Y.S. 2d 694 (2d Dep't 1973); Goines v. Penn R.R., 208 Misc. 2d 103, 143 N.Y.S. 2d 576, rev'd on other grounds, 3 App. Div. 2d 307, 160 N.Y.S. 2d 39, rearg. denied, 4 App. Div. 2d 831, 166 N.Y.S. 2d 303 (1st Dep't 1955).

The requirement that the party assessed with punitive damages be the "actor" exists whether the conduct alleged constitutes a nuisance, a trespass or negligence. 2 N.Y. P.J.I. ¶3:16; (A-92-A-93 and A-1346-A-1347). The plaintiff's own requests to charge include a requirement that "acts" form the predicate for an award of punitive damages. (A-88).

Further, a plaintiff seeking punitive damages must establish that the defendant's acts were "... morally culpable ... or ... activated by evil and reprehensible motives...." Walker v. Sheldon, supra at 404, 223 N.Y.S.

2d at 490, 179 N.E. 2d at 498. No proof to this effect was offered by Doralee - since it was established that no Cities Service personnel was ever at the premises and it had no part in the operation of the oil plant.

There was no competent proof that the officers or directors of Cities Service authorized, participated in, consented to or ratified the conduct on which the punitive damages were based. Cities Service requested that the trial court instruct the jury that Doralee "...must [show] that the officers and directors constituting the management of the defendant authorized, participated in, consented to or ratified the conduct..." which allegedly served as a basis for an award of punitive damages. (A-1356). This requested instruction was based upon the decisions of this court that punitive damages will not be imposed upon a corporation without such a showing. Koufakis v . Carvel, 425 F.2d 892, 905 (2d Cir. 1970); and, Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 842 (2d Cir. 1967). This showing requires that the management or the officers who authorize, participate in, consent to or ratified the conduct complained of be of a managerial level which is sufficiently important to be considered capable of "wielding the whole of the executive power of the corporation." Lake Shore & M.S. Ry. Co. v. Prentice, 147 U.S. 101, 13 S. Ct. 261, 37 L. Ed. 97 (1893); see also, Rose v. Imperial Engine Co., 127 App. Div. 885, 887-888, 112 N.Y.S. 8, 10 (4th Dep't 1908).

No proof of such authorization, participation, consent or ratification by an officer or director of Cities Service was presented at trial. Nevertheless, the court refused to give the requested charge - because of "timeliness" - even though it was requested prior to the court's giving of the charge. (A-1162/2).

Cities Service also made timely objection after a differing charge was given. (A-1294/10 - A-1295/6). In denying Cities Service's objection, the court specifically rejected the clear language of this court, in Roginsky, supra and in Koufakis, supra, by saying:

> I don't think you have to show that the vice-president knew about this or that one of the members of the board of directors of Cities Service had to know about this.

(A-1294/24-A-1295/3). Rather, the trial judge said that only an "official" or a "responsible management official" needed to know of the complained-about activities. This was clearly erroneous. Koufakis v. Carvel, 425 F.2d, supra at 905. Moreover, the record is barren of proof even to this effect.

The verdict form used by the court allowed the jury to reach a potentially inconsistent and erroneous result. The verdict form used by the court was objected to by Cities Service. (A-1185/2 - A-1186/6). The form allowed the jury to render a verdict in which punitive damages could

have been allowed for breach of contract or for simple negligence. (A-1337-A-1338). Such a verdict would be clearly erroneous because neither simple negligence nor simple breach of contract serve as a basis for punitive damages. Gordon v. Nationwide Mutual Insurance Company, 62 Misc. 2d 689, 309 N.Y.S.2d 420 (S. Ct. 1970), aff'd, 37 App. Div. 2d 265, 323 N.Y.S.2d 550 (2d Dep't), rev'd, 30 N.Y. 2d 427, 334 N.Y.S. 2d 601, 285 N.E. 2d 849 (1972), cert. denied, 410 U.S. 931, S. Ct. 1374, 35 L. Ed. 2d 593 (1073) (the New York Supreme Court decision deals with negligence and the Court of Appeals decision deals with breach of contract); Wegman v. Dairylea Coop., Inc., 50 App. Div. 2d 108, 376 N.Y.S. 2d 728 (4th Dep't 1975); Trans-State Hay & Feed Corp. v. Faberge, Inc., 42 App. Div. 2d 535, 344 N.Y.S. 2d 730 (1st Dep't 1973) aff'd, 35 N.Y.2d 669, 360 N.Y.S. 2d 886, 319 N.E. 2d 201 (1973); Van Valkenburgh, Nooger & N., Inc. v. Hayden Pub. Co., 33 App. Div. 2d 766, 306 N.Y.S. 2d 599 (1st Dep't 1969), aff'd, 30 N.Y. 2d 34, 330 N.Y.S. 2d 329, 281 N.E. 2d 142, cert. denied, 409 U.S. 875, 93 S. Ct. 125, 34 L. Ed. 2d 128 (1972); see also, Avery v. Shields, 50 N.Y.S. 2d 939 (Sup. Ct. 1944) (all of which deal with breach of contract). When the jury did render its verdict, the completed verdict form demonstrated the validity of Cities Service's objection that confusion could result. On the verdict form as completed by the jury, it appears that the punitive damages may have been awarded here solely upon an alleged breach of contract or, solely upon simple negligence.

Such a conclusion would be clearly erroneous; the possibility that the jury may have decided the case on this basis requires reversal. Koufakis v. Carvel, 425 F.2d supra at 906-07; citing Walker v. Sheldon, supra. The trial court's error was even further compounded by its refusal to use the Special Verdict form which Cities Service requested, even while the court acknowledged its appropriateness to these proceedings. (A-1180/21-A-1181/25); (A-1333 - A-1335).

The Court should have granted Cities Service's motion to reduce the $200,000 punitive damage award. The court suggested that a motion to reduce the amount be made (A-1325/14-22) and granted leave to Cities Service to make such a motion. Cities Service made such a motion, arguing that the award of punitive damages should be reduced because it was disproportionately large in comparison to the injury allegedly inflicted. Stevenson v. Hearst Consol. Publications, 214 F.2d 902, 911 (2d Cir.), cert. denied, 348 U.S. 874, 75 S. Ct. 110, 99 L. Ed. 688 (1954). Furthermore, Cities Service argued that the injury to Doralee was temporary and not permanent and, therefore, since it could be compensated by the actual damages awarded, justified no more than a small punitive damages award. See e.g., 13 N.Y. Jur. Rev., Damages, §§71-75.

There is ample authority in the State of New York and in this Circuit that a reduction in the amount of punitive damages may be granted by the appellate court. Faulk

v. Aware, Inc., 19 App. Div. 2d 464, 244 N.Y.S. 2d 259 (1st Dep't 1963), mod'g, 35 Misc. 2d 302, 231 N.Y.S. 2d 270 (Sup. Ct. 1962), aff'd, 14 N.Y. 2d 899, 252 N.Y.S. 2d 95, 200 N.E. 2d 778 (1964), cert. denied, 380 U.S. 916, 85 S. Ct. 900, 13 L. Ed. 80 (1965); Toomey v. Farley, 2 N.Y. 2d 71, 77, 156 N.Y.S. 2d 840, 844, 138 N.E. 2d 221, 224 (1956) and Kern v. News Syndicate, 20 App. Div. 2d 528, 244 N.Y.S. 2d 665 (1st Dep't 1963). An award of punitive damages which is grossly disproportionate to the compensatory damages should be disallowed. Green v. Wolf Corporation, 406 F.2d 291, 303 (2d Cir. 1968), cert. denied, 395 U.S. 977, 89 S. Ct. 213), 23 L.Ed. 2d 766 (1969). For example, in the case of Lanfranconi v. Tidewater Oil Company, 376 F.2d 91 (2d Cir.) cert. denied, 389 U.S. 951, 885 S. Ct. 334, 19 L.Ed. 2d 361 (1967), this court reduced from $35,000 to $5,000 punitive damages awarded to a gas station lessee who had been wrongfully evicted. In so reducing the award of punitive damages made by the jury this court noted that the award of $35,000 was disproportionate to the $7500 compensatory damages which had been awarded to the plaintiff for lost earnings. In the case of Faulk v. Aware, Inc., supra, the court, reduced an award of punitive damages in the amount of $1,250,000 against one defendant and $1,000,000 against another defendant to $100,000 and $50,000 respectively and indicated that:

> It is the duty of the court to keep a verdict for punitive damages within reasonable bounds

> considering the purpose to be achieved as well as the mala fides of the defendant in the particular case.

Id. at 472, 244 N.Y.S. 2d at 266. Cities Service argued below that the award of punitive damages was grossly excessive in light of the fact that, at the expense of Cities Service, the bulk oil facility which was the subject matter of the instant action was torn down and six inches of oil-soaked earth removed from the premises within a few months of the institution of this suit, (A-460/24-A-461/12) and that the plant had not been operated for a period of time prior to the institution of the instant suit, (A-12; A-430/5-8). Thus, because the possibility of further damage ended years before the trial, and because Cities Service, at its own expense took every action to ameliorate conditions after MGO's removal, the trial court erred in denying Cities Service's motion to reduce the jury's award of punitive damages.

Cities Service was greatly prejudiced by the introduction over objection, into evidence, of a financial statement showing the net worth of Cities Service to be $1,336,035,000.00. (A-1136/4-8). Cities Service's counsel vigorously opposed the introduction into evidence of this net worth figure. (A-1307/6-14; A-1308/5-11). The allowance of this evidence was particularly erroneous and unnecessary in light of Cities Service's offer to stipulate that it could respond to damages in any amount. (A-1307/15-16). Such being the case, there was no

reason for the court to inform the jury of anything other than the stipulated fact that Cities Service was a corporation* of substantial financial responsibility, without placing before them the highly prejudicial financial statement. Objective proof of the extent of this prejudice is found in Court Exhibit 5 (A-1322; A-1342) a slip of paper on which a juror had written "1 Billion".

V

THE TRIAL COURT ERRED IN DENYING CITIES SERVICE THE THREE PEREMPTORY CHALLENGES TO WHICH IT WAS ENTITLED.

The method of allotment of, and number of, peremptory challenges to a party in a jury trial is governed by the United States Code. 28 U.S.C. §1870. The Code provides, in relevant part, that:

> In civil cases, each party shall be entitled to three peremptory challenges.

*It should be noted that persuasive authority exists - although no authority relating to the exact point could be found in New York - to support Cities Service's argument regarding its offer to stipulate. In Vermont, for example, the courts have recognized that the purpose for using evidence of the financial condition of a defendant "... is to ascertain [his] ability to respond in such [i.e., punitive] damages." Woodhouse v. Woodhouse, 99 Vt. 91, 138-139, 130 A. 758 (1925); see also, Parker v. Hoefer, 118 Vt. 1, 100 A.2d 434, 447 (1953); Cf. Holmes v. Holmes, 64 Ill. 294, 289-'99 (1872). A stipulation satisfies this requirement.

> Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly. (emphasis added).

28 U.S.C. §1870. Although "several defendants" or "several plaintiffs" may be lumped together for the purposes of allotting peremptory challenges this may not be done where parties have an adverse position as to each other. In the instant case, Doralee sued Cities Service, which was the sole defendant. MGO was not a party so far as the plaintiff was concerned. Cities Service, in turn sued MGO. Cities Servicee and MGO were treated as "several defendants" by the Court. It is clear that they were not co-parties and that they were hostile to each other, since they were plaintiff and defendant as to each other. Since MGO was not a co-defendant with Cities Service but, rather, a third-party defendant of Cities Services' third-party claim, the court erred in grouping Cities Service and MGO in respect of their right to peremptory challenges. John Long Trucking, Inc. v. Greear, 421 F.2d 125 (10th Cir. 1970). Nevertheless, over the objection of Cities Service, the court allotted peremptory challenges in the following erroneous manner: Doralee was allowed to exercise three peremptory challenges (A-1031/1-4-A-104/5); however, Cities Service and MGO each were allowed only one peremptory challenge to be exercised individually and Cities Service and MGO were allotted three peremptory challenges to be

exercised jointly. (A-103/1-A-104/5). There was a clear denial of Cities Services' statutory right to the three peremptory challenges available to a sole party. 28 U.S.C. §1870. This error had real and substantial effect when it resulted in the denial, to Cities Service, of the right to exercise a peremptory challenge (A-103/7-16) as to a juror who had expressed great concern over matters of ecology-oil spills. (A-151/11-A-154/4). The denial of the peremptory challenge followed the court's refusal to permit Cities Service counsel to examine the juror following what can only be called a perfunctory voir dire inquiry by the court. (A-154/2-4). The error requires reversal. John Long Trucking, Inc. v. Greear, 421 F.2d supra at 128. As the Court stated in John Long Trucking, Inc. v. Greear, supra:

> ...[the improper sharing of peremptory challenges] result[s] in substantial impairment of the ancient right [to fair jury selection] with consequent denial of the constitutional right to a fair and impartial jury.

Id. at 127, citing, Photostat Corporation, v. Ball, 338 F.2d 783 (10th Cir. 1964).

The trial court erroneously refused to allow Cities Service to exercise its only peremptory challenge when it ruled that Cities Service had waived the challenge by having "passed" on its right to challenge at a particular time during jury selection, reserving the challenged for a subsequent round. (A-154/8-15; A-163/12-17). The Court ruled that Cities Service's decision to "pass" at a particular time, while

reserving the challenged for the future, constituted a waiver of the peremptory challenge - even though no Federal Rule of Civil Procedure and no local rule deals with this subject. Further, no authority of any kind has been found by Cities Service supporting the court's position. Since the essence of waiver is "the intentional relinquishment of a known right", and since, in relation to waiver, "intent must be clearly established and cannot be inferred from a doubtful or equivocal act," no waiver of its peremptory challenge by Cities Service should have been imposed by the Court. Horne v. Radiological Health Services, P.C., 83 Misc. 2d 446, 371 N.Y.S. 2d 948, 961 (Sup Ct. 1975); see also, American Bridge Co. v. State, 245 App. Div. 535, 283 N.Y.S. 577 (3d Dep't. 1935); and, Cicero Industrial Development Corp. v. Roberts, 63 Misc. 2d 565, 312 N.Y.S. 2d 893 (Sup. Ct. 1970). In ultimate fact and effect, Cities Service was allowed no peremptory challenges of its own, even though it was the defendant, and Doralee, the plaintiff, was allowed to exercise three such challenges.

Since the wrongful deprivation of peremptory challenges inherently results in an unfair trial, see, John Long Trucking, Inc. v. Greear, supra, this court should reverse the judgment below.

VI

THERE WERE NUMEROUS ERRORS IN RULINGS DURING THE TRIAL WHICH SUBSTANTIALLY PREJUDICED CITIES SERVICE

Throughout the course of the proceedings the trial

judge made numerous rulings which resulted in prejudice to Cities Service. The following describes the erroneous rulings and the prejudicial conduct of the court.

There was no claim in the complaint herein for breach of a stipulation of settlement made between the plaintiff and Cities Service in a prior action in the state Supreme Court. To the contrary, the plaintiff alleged a cause of action to vacate and set aside the stipulation of settlement (A-11). Notwithstanding this, the court, practically of its own motion, construed the plaintiff's claim to be a claim for breach of the settlement agreement, the very converse of what had been pleaded by the plaintiff (A-11; A-648/4-A-649/8). The plaintiff did not initiate this new claim in reversal of its pleaded theory of action, and did not move for an amendment to this effect, but the court considered the new claim (clearly a surprise to Cities Service) to be covered by plaintiff's motion to conform the pleadings to the proof and submitted to the jury the question of whether Cities Service had breached the stipulation of settlement (A-1268/4-20).

Since the stipulation merely called for alternative action by the defendants - either to construct an oil separator system or discontinue the use of the plant - and since the alternative of plant use discontinuance was exercised on February 10, 1973 - it is difficult (even though it is clear that the stipulation was performed) to perceive what would be the plaintiff's damages if a breach were shown.

However, the court expressed the view, in vigorous language, that in making the settlement agreement in the state court action, Cities Service had assumed all the responsibilities of an operator of the plant, notwithstanding the clear proof that MGO, not Cities Service, was the operator. (A-328/11-A-329/3-14; A-329/22-A-330/10). At another point in the record, the court stated in respect of the settlement agreement "If there is a breach of that commitment, isn't it the same as though [Cities Service] were there every day helping to pump the trucks?" (A-329/2-3; see also, A-329/4-A-330/10).

The court's active role in fostering a new claim of the plaintiff which represented clear legal surprise since it was not in any way asserted or foreshadowed before trial, and the court's submission of this claim to the jury (A-1268/4-20) was highly prejudicial to Cities Service and should result in a reversal. Armstrong Cork Company. v. Lyons, 366 F.2d 206 (8th Cir. 1966); see also, Sylvan Beach v. Koch, 140 F.2d 852 (8th Cir. 1944).

Collateral to the position assumed by the court with respect to the stipulation of settlement is its submission to the jury (A-1264/8-A-1265/18) of the question of whether a general release, admittedly prepared by plaintiff's attorney and signed by plaintiff's president in its attorney's presence (A-645/2-12) released Cities Service, according to its terms, for the period through October

24, 1972. Plaintiff's attorney made no claim that the date in the release was erroneous - he merely contended that the release was surplusage in relation to what he asserted to be the controlling stipulation. (A-646/7-11). The court, at its own instance, interjected the question of whether the stipulation should be revised as to its effective date. (A-646/12-A-648/3; A-651/6-12). Indeed, the court actively participated in questioning on this point. (A-664/14-A-665/13). The witness, the president of Doralee, furnished a clear and credible explanation of why the release contained the date, October 25 (A-664/17-18), but, nevertheless, the court, as well as counsel, persisted in further questioning, as if looking for a different answer. Upon the court's interjection of this new issue, it was pointed out to him that reformation of the document had at no time been sought by plaintiff. (A-648/15-19). Nevertheless, he submitted to the jury the question of whether the release was effective through October 24, 1972, the date provided therein, or only through April 25, 1972 (A-1264/8-A-1265/18; A-1337), notwithstanding the lack of basis in law to reform an instrument prepared by, and signed in the presence of one's own lawyer or to reform a document on the basis of unilateral misunderstanding. Pimpinello v. Swift & Co., 253 N.Y. 159, 170 N.E. 530 (1930).

Highly prejudicial to the interests of Cities Service was the hard line taken by the trial court in the presence of the jury when Doralee's president, Mrs. Huss, persistently

and obdurately referred to the release as a "form" and refused, notwithstanding its internal identification as a release, to accept counsel's characterization of the document as such. (A-717/25-A-719/8; A-679/14-A-684/20). The court's castigation of Cities Service counsel for referring to the document as a "release" is utterly inconsistent with the identification of the document as a "release" by the court (A-646/21; A-646/25; A-647/15; A-647/7) and by plaintiff's own counsel (A-646/10; A-647/10-12; A-647/15). The court's chastisement of Cities Service counsel (A-717/ 25-A-718/25; A-723/6-24) for referring to the release by the word which properly identifies it, is indeed difficult to understand in the face of the foregoing and the refusal by an intelligent and experienced business person to acknowledge its character and identity. The net effect of the court's action on the jury was to down-grade a general release, a document of the highest dignity and effect - into a mere nothing - a "form". The motion of Cities Service for a mistrial at this point (A-747/18-A-748/11) was denied.

The credibility as a witness of Mrs. Huss (so stoutly championed by the trial judge) may be gauged by reading her equivocations as to the release she signed (A-678/13-A-684/20), her evasions regarding her letters complaining of an inflow of raw sewage onto her property (A-684/21-A-691/20), and her incredible testimony that she believed that the signing and delivery of the release was meaningless - that she was receiving $12,500 and retaining her claims. (A-716/4-18).

When objection was taken by Cities Service counsel to the hearsay aspect of the testimony of plaintiff's real estate witness (A-502/20-A-503/9), the court castigated Cities Service counsel for taking what the court admitted to be a proper objection (A-504/2-A-506/5) and proceeded to admit the testimony. The proof by Edison, plaintiff's real estate witness, consisted of no more than a comparison of hearsay rent figures for 1976, obtained from plaintiff and its counsel, with similar hearsay rent figures for 1976 obtained in respect of other bungalow colonies. Apart from the hearsay objection, objection was made that figures relating to the year 1976 were not relevant. This objection was overruled. (A-508/8).

Although Mr. Edison testified that he merely was comparing rents, with no consideration of comparability of facilities, the court overruled an objection to a question which solicited the witness' opinion as to the bare arithmetical comparison of the Doralee rents with those at other bungalow colonies. (A-508/23-A-509/24). When Cities Service sought to introduce an exhibit (E-148), which tabulated the effect of Mr. Edison's own testimony into a differential of only $9,492.00 against Doralee for the years 1973 through 1976, inclusive, the court, after twice admitting the exhibit (A-1068/7-9; A-1073/5-6) ultimately reserved decision on the exhibit and finally excluded it. (A-1102/7-A-110617). It was obviously of great prejudice to Cities Service to be foreclosed from presenting to the jury an understandable

tabulation which reduce to a relatively small sum the amount of damages that might have been derived from Edison's lengthy testimony. (Id.; E-148).

In the case of the deposition of Spodaryk, the New York State Environmental Conservation Department chemist, plaintiff's counsel read from the deposition to the jury. When Cities Service counsel commenced to read from the deposition, objection was made by plaintiff's counsel and the court sustained the objection, notwithstanding that it was pointed out that plaintiff's counsel had been permitted to do what the court did not allow Cities Service to do. (A-613/11-A/615/7).

A most unusual tactic - manifestly to the disadvantage of Cities Service - was the court's direction to Cities Service counsel, before the MGO motion to dismiss the third-party complaint was made, to distinguish the case of McLean v. L.P.W. Realty Corp., supra, and, in general, to present, anticipatorily, grounds of opposition to the yet unmade MGO motion to dismiss. The court then foreclosed Cities Service counsel from the privilege of responding to the MGO motion to be thereafter made, saying that Cities Service had been given a full opportunity to speak. (A-1085/9-19). It is difficult to conceive of anything more unfair than to foreclose counsel from an opportunity to respond to a dispositive motion after an opportunity to hear the grounds and authorities on which it is based. In this case, the court asked Cities Service counsel, in vacuo, to rebut a motion not made and then precluded a

response to the motion itself on the ground that Cities Service counsel had spoken (at the court's direction) prior to the MGO motion to dismiss.

The court's intervention in the questioning of witnesses operated to convey to the jury the belief that that the court held views favorable to the plaintiff's case. When a witness was questioned as to his understanding of the terms of the written lease between Cities Service and MGO, an objection was made to such question on the ground that the lease was the best evidence, the court overruled the objection and then stated in the presence of the jury:

> The question is whether Cities Service owning a tank plant like that would have the right to go in and inspect it to make sure that the premises was kept up in good order.

(A-487/15-18). This commentary on what in the first instance was an improper question was undoubtedly prejudicial to Cities Service. The court's admission into evidence against Cities Service of the Department of Environmental Conservation Consent Order (A-410/2; E-51-E-52) fining MGO for oil pollution and its admission into evidence against Cities Service of the Department of Environmetnal Conservation report directed against pollution charged to MGO (A-914/14-20; E-3-E-9 redacted; E-10-E-16 unredacted) and its admission into evidence of numerous memoranda and communications involving events before the general

release delivered by plaintiff to Cities Service (A-193/4-12; E-1, E-17-18 redacted; E-19-E-20 unredacted; et al.) and subsequent to the date of institution of this action by plaintiff, and none relevant to liability of Cities Service (E-20; E-21; E-26-E-27; E-28-E-29; E-30; E-31; E-32; E-33; E-34; E-36; E-37-E-38; E-40-E-41; E-42; E-43-E-48; E-49-E-50; E-65), constituted error and were significant communications to the jury of the court's frame of mind which was explicitly revealed in sidebar discussions (A-329/2-3; A-329/13-14; A-330/5-10). The most prejudicial disclosure to the jury of the court's attitude is found in its verbatim quotation to the jury of the New York State Environmental Conservation Act §§17-0101; 17-0105(2), (5) and (6) and 17-0501 (A-1283/17-A-1285/ 11) (a quotation spelling out a criminal act) in face of the undisputed fact that Cities Service was neither charged with nor found guilty of any violation of the Act. Not insignificant is the fact that the court charged the jury that "[I]n determining whether or not the plaintiff is entitled to recover punitive damages, you may consider whether it entered the 1972 settlement agreement in bad faith..." (A-1286/16-19), when there was not an iota of proof in support of the charge. Similarly, the record is bare of proof to support the court's charge of "[W]hether or not the defendant knowingly violated a stipulation in the Supreme Court of the State of New York in April 1972." (A-1286/ 19-21). Egregious error in reflected by the charge "[Y]ou may also consider whether or not the defendant is guilty of misconduct so flagrant as to transcend mere carelessness . . ."

(A-1286/22-24) on a record which shows that MGO, not Cities Service, was operator of the plant (A-1287/ 8-11), that MGO, not Cities Service, was cited for pollution, and that Cities Service, after MGO vacated the plant, expended substantial money to remove the oil-soaked earth and demolished the buildings and equipment on the premises.

An interesting sidelight on the court's attitude is found in the response made by the court to the request of Cities Service counsel at 12:45 P.M. to an extended lunch recess to permit some amount of time to prepare for cross-examination of a witness which was to commence after the lunch recess. The court fixed a total recess of one hour (A-512/7-19; A-513/3). and thereafter stated to Cities Service counsel that on hour of additional time had been allowed to prepare for cross-examination of the witness. (A-581/12-19).

Similar to this was the court's disposition of the request of Cities Service counsel that summation by both sides be held on the same day, a request obviously intended to prevent an advantage to the plaintiff which would result if it were given the opportunity for summation after defendant's summation on the preceding day had faded in the memory of the jury. (A-1168/24-A-1169/10). The request for summation by both sides on the same day was denied, notwithstanding the fact that Cities Service's summation was ended at 3 P.M. which would have left ample time on that day for plaintiff's summation. Alternatively, both summations could have been

held on the next day. Since a verdict was rendered by 3 P.M. of the day on which plaintiff summed up and the court gave its charge, it is self-evident that there would have been ample time on that day for Cities Service, as well as plaintiff, to have summed up, since its summation of the prior day lasted approximately 90 minutes. (A-1185/2; A-1216/4).

The court admitted into evidence, at plaintiff's insistance, a substantial number of photographs, some highly prejudicial and others beyond optical interpretation, almost all of which were taken either prior to the date of the release delivered by plaintiff (A-641/7, 23) or substantially after this suit was filed (A-632/11-17).

A final point to be noted in respect of the court's handling of the trial is the matter of substantial publicity, before and during the trial, relating to oil pollution resulting from accidents to oil tankers. Although the court was fully aware of this, both during jury selection and before charging the jury (A-134/18-25), it failed to give proper instructions and admonition to the jury which would in a positive, rather than perfunctory, way, operate to dispel any possible prejudice from the jury's mind.

Collectively, the aforementioned matters had a serious prejudicial effect on the rights of Cities Ser-

vice, sufficient, apart from all other considerations, to require the setting aside of the verdict and judgment.

CONCLUSION

The judgment and verdict below in favor of Doralee against Cities Service should be reversed and set aside; the order dismissing the third party claim of Cities Service against MGO and Monticello Gas & Oil should be reversed; the order denying the motions of Cities Service to dismiss the complaint and for judgment in its favor n.o.v. should be reversed and such motions should be granted; and the order denying Cities Service's motion to reduce primitive damages should be reversed.

Respectfully submitted,

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ADDENDUM OF STATUTES

A-1

N.Y. Environmental Conservation Law

§17-0101. Declaration of policy

It is declared to be the public policy of the state of New York to maintain reasonable standards of purity of the waters of the state consistent with public health and public enjoyment thereof, the propagation and protection of fish and wild life, including birds, mammals and other terrestrial and acquatic life, and the industrial development of the state, and to that end require the use of all known available and reasonable methods to prevent and control the pollution of the waters of the state of New York.

§17-0105. Definitions applicable to portions of this article

. . .

2. "Waters" or "waters of the state" shall be construed to include lakes, bays, sounds, ponds, impounding reservoirs, springs, wells, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Atlantic ocean within the territorial limits of the state of New York and all other bodies of surface or underground water, natural or artifical, inland or coastal, fresh or salt, public or private (except those private waters which do not combine or effect a junction with natural surface or underground waters) which are wholly or partially within or bordering the state or within its jurisdiction.

5. "Industrial waste" means any liquid, gaseous, solid or waste substance or a combination thereof resulting from any process of industry, manufacturing, trade, or business or from the development or recovery of any natural resources, which may cause or might reasonably be expected to cause pollution of the waters of the state in contravention of the standards adopted as provided herein.

6. "Other wastes" means garbage, refuse, decayed wood, sawdust, shavings, bark, sand, lime, cinders, ashes, offal, oil, tar, dye-stuffs, acides, chemicals, and all other discarded matter not sewage or industrial waste which may cause or might reasonably be expected to cause pollution of the waters of the state in contravention of the standards adopted as provided herein.

§17-0501. General prohibition against pollution

1. It shall b e unlawful for any person, directly or indirectly to throw, drain, run or otherwise discharge into such waters organic or inorganic matter that shall cause or contribute to a condition in contravention of the standards adopted by the department pursuant to section 17-0301.

N.Y. General Obligations Law

§5-321. Agreements exempting lessors from liability for negligence void and unenforceable

Every covenant, agreement or understanding in or in connection with or collateral to any lease of real property exempting the lessor from liability for damages for injuries to person or property caused by or resulting from the negligence of the lessor, his agents, servants or employees, in the operation or maintenance of the demised premises or the real property containing the demised premises shall be deemed to be void as against public policy and wholly unenforceable.

28 U.S.C.

§1870. Challenges

In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.

All challenges for cause or favor, whether to the array or panel or to individual jurors, shall be determined by the court.

State of New York
Court of Appeals

4 No. 240
Martha Hogeland &an[illegible],
Plaintiffs,
vs.
Sibley, Lindsay & Curr Co.,
Respondent,
and The Berenson Corporation,
Appellant.

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

(240)William Eggers & John B. McCrory, Rochester, for appellant.
Michael J. Tobin, Rochester, for respondent.

FUCHSBERG, J.:

The main issue on this appeal is whether the defendant-appellant The Berenson Corporation is entitled to recover on its cross-claim for contractual indemnity against its lessee, the co-defendant Sibley, Lindsay & Curr Co., pursuant to certain clauses of the lease between these parties. Since they were landlord and tenant, a subsidiary issue involves the effect, if any, of General Obligations Law §5-321[1] on the enforceability of the lease's indemnity provisions.

Berenson owns the Irondequoit Shopping Center; Sibley, which operates a large department store in the Center, is the major tenant. The underlying actions, in which both Berenson and Sibley were named as defendants,

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1. "Every convenant, agreement or understanding in or in connection with or collateral to any lease of real property exempting the lessor from liability for damages for injuries to person or property caused by or resulting from the negligence of the lessor, his agents, servants or employees, in the operation or maintenance of the demised premises or the real property containing the demised premises shall be deemed to be void as against public policy and wholly unenforceable."

arose out of personal injuries sustained by the plaintiff Martha Hogeland, a customer of Sibley, when, in the course of leaving the store, she fell over a low-lying concrete planter box whose presence was obscured by unremoved snow and slush. The box was located about twenty feet from a Sibley entrance on a canopied sidewalk which ran along one side of the Sibley store.

While the sidewalk was not part of the leased premises, it and the planter box had been constructed by Berenson's contractors pursuant to plans and specifications drawn by Sibley's architects. There was also evidence at trial that, under their mutual arrangements for snow removal, employees of each defendant were separately charged with that task during certain intervals of the time period during which it had accumulated on this occasion and that both would see to the care of the shrubs and plants grown in the box in question.

The jury having found both defendants negligent and jointly liable to Mrs. Hogeland and her husband, it thereafter, in accordance with the practice emanating from Dole v. Dow Chemical Co. (30 NY 2d 143), proceeded to allocate proportionate responsibility as between the two defendants at sixty percent for Berenson and forty percent for Sibley. Berenson's contractual cross-claim having been submitted by stipulation of the defendants for determination by the court alone,[2] the trial court then granted judgment over for indemnification in favor of Berenson against Sibley for $16,440.80, the sum which it was agreed represented sixty percent of the Hogeland judgment plus the expenses incurred by Berenson in its defense of the negligence action.[3] However, on Sibley's appeal from that determination, the Appellate Division reversed and dismissed the cross-claim (51 AD 2d 886). The present appeal to us by Berenson followed.

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2. Berenson's cross-claim for common law indemnity was dismissed by the court once the jury found both parties in pari passu as to the nature of each one's negligence (Tipaldi v. Riverside Memorial Chapel, 273 AD 414, 418, affd. 298 NY 686).

3. The Hogelands' judgment was satisified and therefore was not the subject of any of the appeals in this action as such.

The lease, insofar as pertinent here, provided:

"ARTICLE IX.

Indemnity and Public Liability Insurance

"Section 1. The tenant agrees to indemnify and save harmless the Landlord from and against all claims of whatever nature arising from any act, omission or negligence of the Tenant, or Tenant's contractors, licensees, agents, servants or employees, or arising from any accident . . . whatsoever caused to any person . . . in or about the Tenant's demised premises, or . . . occurring outside of the demised premises but within the Shopping Center development . . . where such accident . . . results . . . from an act or omission on the part of Tenant . . . . This . . . agreement shall include indemnity against all costs, expenses and liabilities incurred in or in connection with any such claim or proceeding brought thereon, and the defense thereof.

"Section 2. The Tenant agrees upon written request of the Landlord . . . to maintain . . . a policy of public liability and property damage insurance under which the Landlord . . . and the Tenants are named as insureds, and under which the insurer agrees to indemnify and hold the Landlord . . . harmless from and against all cost, expense and/or liability arising out of or based upon any and all claims, accidents, injuries and damages mentioned in Section 1 of this ARTICLE IX . . . The minimum limits of liability of such insurance shall be one hundred thousand dollars ($100,000) for injury (or death) to any one person . . . . [T]he Landlord will reimburse the Tenant for any extra premium paid by the Tenant on account thereof. In any event the Tenant will without cost to the Landlord maintain during the term hereof such a policy in effect wherein it will be named as the insurer. . . .

"Section 5. Anything in this ARTICLE to the contrary notwithstanding, nothing in this Lease shall be construed to relieve the Landlord from responsibility to the Tenant for any loss or damage caused the Tenant wholly or in part by the negligent acts or omissions of the Landlord; except, however, that the Landlord shall not be responsible for such portion of such loss or damage which is recovered by the Tenant from insurance covering such loss or damage or for such portion of such loss or damage against which the Tenant is indemnified or insured. . . ."

Analysis of Section 1 of the foregoing provisions readily discloses that it contemplates three sets of circumstances: (a) claims against Berenson arising from the negligence of Sibley, its contractors or licensees, (b) claims against Berenson arising from any accident occurring "in or about" the Sibley premises and (c) claims arising out of negligence of Sibley anywhere in the shopping center.

To sustain the Appellate Division's dismissal, Sibley, while agreeing that the second eventuality, (b), could be interpreted as intended to indemnify Berenson against its own negligence, here contends that the clause nevertheless does not apply because the Hogeland accident did not occur "in or about" its premises. Insofar as the other two eventualities, (a) and (c),

are concerned, it argues that they are not to be deemed to include indemnification for injuries caused, as they were here, in part by reason of Berenson's own negligence. Further, it takes the position, as had the Appellate Division, that indemnity is also to be denied to Berenson because of Article IX, Section 5's language that the landlord was not to be relieved from "responsibility to the Tenant for any loss or damage caused the Tenant wholly or in part by the negligent acts or omissions of the Landlord."

Berenson, on the other hand, urges that the provisions in question manifest an unmistakable intent to indemnify under all three parts of Article IX, Section 1 irrespective of Berenson's own negligence, that Sibley's exemption from liability to Berenson under Section 5 was not applicable to claims arising out of injuries to third parties such as Mr. and Mrs. Hogeland and that General Obligations Law §5-321 does not bar indemnity in this case.

We hold that Berenson was entitled to indemnification. Our reasons follow:

At the very outset, we remark on the fact that the lengthy lease before us obviously was one negotiated at arm's length between the representatives of two sophisticated business entities, one a large department store company and the other the real estate corporation which organized, owned, constructed and managed the shopping center. The tenant had tailored the construction to its special needs. And the mutual nature of the arrangements for the maintainance of appurtenances such as those involved in this very case is tell-tale evidence that the lease was not one whose making was dominated by either party.

A lease or other contract entered into under such circumstances by parties so situated is no longer to be construed as not intending indemnification of a party for its own negligence unless that intention is set forth in specific and "unequivocal terms" (see Thompson - Starrett Co. v. Otis Elevator Co., 271 NY 36,41). Instead, in such cases we now look to the "unmistakable intent of the parties" rather than the semantic stereotypes with which an agreement may be phrased (Levine v. Shell Oil Company, 28 NY 2d 205, 211). It suffices that the agreement between the parties

connotes an "intention to indemnify [which] can be clearly implied from the language and purposes of the entire agreement . . ." (Margolin v. N.Y. Life Ins. Co., 32 NY 2d 149, 153).

Applying that standard to the present case, and turning initially to the first and third parts of Section 1 of the indemnification clauses, we note that, though those two subsections speak only of Sibley's negligence, neither expressly exempts Sibley from its obligation to indemnify in the event that its negligence is shared with that of Berenson. However, it is unnecessary here for us to decide whether an obligation to indemnify Berenson can be implied from that language. For, even assuming, arguendo, that it does not, the second part of Section 1 in any event clearly supports Berenson's right to indemnification.

It is significant that that part makes no reference to negligence of Sibley or of Berenson. Its broad inclusion of "any accident . . . whatsoever to any person" is qualified only by the words "in or about the Tenant's demised premises". It is not to be read as limited in its spatial description to "in the demised premises" for then "or about" would have no meaning.

Moreover, the phrase "in or about" is one of art. Defined as "a phrase having reference to an area and expressing the idea of physical proximity" (Ballantine's Law Dictionary, [3d ed.], p.631), it frequently is used synonymously to mean "around" or "on the outside of" (Thompson v. Banks, 43 N.H. 54). It signifies locality (cf. Wise v. Central Dairy Co. 121 Kan. 258, where a workman injured 200 feet from the factory was injured "in, on or about factory"). Consequently, in the context of the facts of this case, it must be held to include the sidewalk area where the accident happened. Mrs. Hogeland was then actually in the process of departing the Sibley premises. She was still on the sidewalk which served it alone and was still under the canopy it had erected either to attract or shelter its customers. Indeed, the undisputed evidence was that at times Sibley would actually close off a portion of the sidewalk and use it as an additional sales area. As the jury apparently found, it joined in its maintainance.

It is evident too that Article IX, Section 5 does not vitiate Berenson's right to indemnification. That section, an exculpatory rather than indemnitory clause, relates only to loss or damage Berenson might occasion directly to Sibley and then only to the extent that Sibley has not otherwise been paid for its loss by insurance or other forms of indemnity. By no means does it affect any right to indemnity from Sibley to which Berenson may be entitled under Section 1 in order to recoup for payments made to compensate for losses of third parties.

Further support for this interpretation is to be found in the provisions for insurance found in Section 2 of Article IX of the lease. In limits far exceeding the judgment at stake here, the insurance described is to protect not only against liability claims against both defendants but expressly provides for any indemnity claims which Berenson might bring against Sibley under Section 1. In the realities of today's world of business, Section 2's concern with the avoidance of duplicate insurance and the absorption of any additional premium therefor by the landlord almost indisputably proclaims a mutuality of intent to insure rather than to negate its payment if the occasion for indemnification under Section 1 should arise. Public policy is certainly not undermined by a frank recognition of such a perfectly common and acceptable business practice by which an entrepreneur may provide protection against its own fault.

Nor does General Obligations Law §5-321 interdict Berenson's right to recover. Enacted originally in 1937 to overcome the decision in Kirschenbaum v. General Outdoor Advertising Co. (258 NY 480), Section 5-321 was, at least in part, a response to "the widespread use in New York City of such contracts resulting in unequal bargaining power between lessor and lessee" (1949 Report of N.Y. Law Rev. Comm., p. 815; see Billie Knitwear, Inc v. New York Life Ins. Co., 262 AD 714, 715 [dissenting opinion], affd 288 NY 682). The legislative history and the statute's express invalidation of any agreement "exempting the lessor from liability for damages for injuries . . . resulting from the negligence of the lessor" (emphasis added) strongly suggests that it was directed primarily to exculpatory clauses in leases whereby lessors are excused from direct liability for otherwise

valid claims which might be brought against them by others. It and several parallel provisions (see General Obligations Law, §§5-322,5-322.1, 5-323, 5-325) prohibit agreements which free landlords (or others in comparable relationships) from all responsibility to a tenant (or others) for negligence; the former are thus compelled at their own peril to retain the incentive to act prudently.

It is against this background of declared purpose that the indemnification clauses before us must be considered. So analyzed, Berenson is not exempting itself from liability to the victim for its own negligence. Rather, the parties are allocating the risk of liability to third parties between themselves, essentially through the employment of insurance. Courts do not, as a general matter, look unfavorably on agreements which, by requiring parties to carry insurance, afford protection to the public (cf. St. Vincent's Medical Center of Richmond v. Vincent E. Iorio, Inc., 78 Misc. 2d 968; but see Board of Ed., Utica School Dist. No. 1 v. Delle Cese, 65 Misc. 2d 473). Thus, in Brentano's v. Charter Management Corp. (46 AD 2d 861), an indemnification provision was held not to violate GOL 5-321 since it required that the landlord and the tenant carry their own insurance.

Significantly, it was thought noteworthy in Levine v. Shell Oil Company (supra, p.213), that there was no evidence there of "fraud or overreaching conduct", that it was an "arm's length transaction" and that "there has been no showing that the agreement involved . . . either a contract of adhesion or an unconscionable agreement". This is not to say that adhesion principles may not be applicable to an agreement entered into in a commercial lease, but rather that they do not apply here where the landlord contracted for no direct exculpation from negligence towards his indemnitor, where insurance was provided as a form of continued responsibility and where the parties were so equal in their relative bargaining positions (see Love, Landlord's Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability, 75 Wisc. L. Rev. 19,85).

Accordingly, the order of the Appellate Division should be reversed and the order and judgment of Supreme Court, Monroe County, reinstated.

* * * * * * * * * * * * * *

Order reversed, with costs, and the order and the judgment of Supreme Court, Monroe County reinstated. Opinion by Fuchsberg, J. All concur.

Decided June 16, 1977

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss .

Robert Salant, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 149 Tehama St

That on the 20 day of July, 1977, deponent personally served the within BRIEF FOR APPELLANT upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose

By leaving 2 true copies of same with a duly authorized person at their designated office.

~~By depositing _____ true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United States post office department within the State of New York.~~

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses

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ATTORNEYS FOR THIRD PARTY DEFENDANTS-
APPELLEES MGO CORP. & MONTICELLO GAS & OIL CO. INC.

Robert Salant

Sworn to before me this
20 day of July, 1977

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Queens County
Commission Expires March 30, 1979

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss .

ROBERT LA GRASSA, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 62-20 60'RD MASPETH, N.Y. .

That on the 20 day of JULY 1977, deponent personally served the within BRIEF FOR APPELLANT

upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

~~By leaving ____ true copies of same with a duly authorized person at their designated office.~~

By depositing 2 true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United States post office department within the State of New York.

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses

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DORALEE ESTATES, INC.

Robert La Grassa

Sworn to before me this
20th day of July 1977

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930008
Qualified in Queens County
Commission Expires March 30, 1979